Ngiam Geok Mooi v Pacific World Destination East Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(IM)-974–06 OF 2015
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
12 APRIL 2016

Administrative Law — Judicial review — Certiorari — Appellant dismissed by employer — Industrial Court found in favour of appellant — Respondent applied for judicial review seeking writ of certiorari — Trial court allowed respondent's application — Appellant appeal against decision of trial court — Whether trial court right in quashing award by Industrial Court — Whether decision to terminate appellant disproportionate to misconduct committed

This was an appeal against the decision of the High Court in granting the respondent's application for an order of certiorari to quash the award given by the Industrial Court. The appellant was employee of the respondent. The problem arose when her immediate boss Mr Manuel Ferrer and the Managing Director for Asia, Mr Jacques Arnoux, wanted a further upward adjustment of the budgetary goal from 1,228,000 Euros to 1,447,000 Euros. The direction was inconsistent with the directive of its headquarters ('HQ') in London and would have gravely disrupted the work of the Malaysian office. As the factual matrix would further unfold, the appellant was summarily dismissed from her employment on 30 December 2009. The reason given was for insubordination to orders given by her superior. Subsequently, the appellant made a representation for reinstatement pursuant to s 20(1) of the Industrial Relations Act 1967. Thereafter, the Minister of Human Resources referred the matter for adjudication to the Industrial Court. The Industrial Court found that the appellant had committed one act of insubordination but held that the punishment of termination from service was too harsh and ordered payment of compensation and back wages instead. Dissatisfied with the award given, the respondent applied to the trial court for judicial review seeking the issuance of a writ of certiorari to quash the award. The trial court allowed the respondent's application, hence, this appeal. The appellant submitted that the punishment meted out by the respondent in summarily dismissing the appellant from service was grossly excessive, harsh and disproportionate to the nature of the charge established against the appellant. The appellant also argued that the learned judge fell into serious error in holding that the Industrial Court failed to direct its mind to the cumulative acts of insubordination. Further, there was also rhyme or reason for the learned judge to quash the award as the Industrial Court had not acted on no evidence or had come to a conclusion it could not reasonably come to. Lastly, the appellant submitted that there were no

extenuating and aggravating circumstances existing against the appellant which would lead to the imposition of extreme penalty of dismissal by the respondent. In reply, respondent argued that the Industrial Court had erroneously failed to exercise its jurisdiction in appreciating the evidence on record, had misapplied the law and failed to take relevant facts into consideration. The respondent further submitted that the appropriate test to determine whether it was reasonable to dismiss the worker is the reasonable employer's test. Lastly, the respondent contended that the reason for dismissal was gross insubordination; that the penalty imposed on the appellant was within the range of reasonable response for a reasonable employer; and that the determination of an appropriate sanction sentence is a matter which is largely within discretion of the employer. The issue for determination was whether the decision to terminate the appellant from service was disproportionate to the proven misconduct committed by the appellant.

Held, allowing the appeal with costs of RM20,000:

(1) It trite that where an employer chooses to set policies that govern its conduct, as well as that of its employees, the employer should expect to be held to those policies and the legitimate expectations they create on the part of both the employer and the employee (see para 37).

(2) Having considered the appeal record, the court found that there was substantial evidence to support the Industrial Court's finding of fact. It is trite law that findings of fact of trial courts are entitled to great weight on appeal and should not be disturbed except for strong and valid reasons. The court did not find any cogent reason to disturb the finding of the Industrial Court on this point (see para 39).

(3) The proportionality principle requires the court to strike an effective balance between the severity of an employee's conduct and the sanction imposed. Punishment should be commensurate with the gravity of the offence. Thus, applying the proportionality test, the learned judge had committed a grave error in interfering with award rendered by the Industrial Court (see paras 24 & 41).

(4) The court was of the opinion that the learned High Court judge erred in interfering with the award handed down by the Industrial Court. The court agreed with the finding of the Industrial Court that under the circumstances and factual antecedents of the case, the dismissal meted out on the appellant was too harsh a penalty and grossly disproportionate to the gravity of the misconduct committed by the appellant. The appellant's misconduct did not warrant the imposition of the ultimate sanction of dismissal from service (see paras 33–34 & 41).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi dalam membenarkan permohonan responden bagi satu perintah certiorari untuk membatalkan award Mahkamah Perusahaan. Perayu adalah pekerja responden. Masalah timbul apabila majikannya Encik Manuel Ferrer dan Pengarah Urusan Asia, Mr Jacques Arnoux, menjalankan penyelarasan peningkatan matlamat belanjawan daripada 1,228,000 Euro ke 1,447,000 Euro. Arahan ini tidak selaras dengan arahan ibu pejabat ('HQ') di London dan akan mengganggu kerja-kerja pejabat Malaysia. Fakta selanjutnya mendedahkan lagi bahawa perayu dipecat daripada pekerjaannya pada 30 Disember 2009. Alasan yang diberikan adalah kerana ingkar perintah yang diberikan oleh orang atasannya. Lanjutan itu, perayu membuat representasi untuk pengembalian semula di bawah s 20(1) Akta Perhubungan Perusahaan 1967. Seterusnya, Menteri Sumber Manusia merujuk perkara tersebut kepada pengadilan di Mahkamah Perusahaan. Mahkamah Perusahaan mendapati bahawa perayu telah melakukan satu perbuatan membangkang tetapi memutuskan bahawa hukuman pemecatan terlalu berat dan mengarahkan pembayaran pampasan dan gaji kebelakang. Tidak berpuas hati dengan award yang diberikan, responden memohon kepada mahkamah perbicaraan bagi semakan kehakiman, memohon pengeluaran writ certiorari membatalkan award tersebut. Mahkamah perbicaraan membenarkan permohonan responden, dan dengan itu, rayuan ini. Perayu menghujahkan bahawa hukuman yang dijatuhkan oleh responden iaitu secara terus menolak perayu daripada perkhidmatan adalah terlalu berlebihan, keras dan tidak seimbang dengan sifat pertuduhan yang dibuktikan terhadap perayu. Perayu juga menghujahkan bahawa hakim tersebut terkhilaf dalam memutuskan bahawa Mahkamah Perusahaan gagal mengarahkan mindanya kepada tindakan ingkar kumulatif. Di samping itu, terdapat juga sebab untuk hakim membatalkan award tersebut kerana Mahkamah Perusahaan tidak memutuskan berdasarkan bukti atau telah membuat kesimpulan munasabah. Akhir sekali, perayu menghujahkan bahawa tidak ada keadaan sedia ada yang memburukkan terhadap perayu yang akan membawa kepada pengenaan penalti melampau iaitu pemecatan oleh responden. Dalam jawapannya, responden menghujahkan bahawa Mahkamah Perusahaan secara khilafnya gagal menjalankan bidang kuasanya dalam mempertimbangkan keterangan rekod, telah tersalah pakai undang-undang dan gagal mempertimbangkan fakta. Responden menghujahkan bahawa ujian yang sesuai untuk menentukan sama ada munasabah untuk memecat pekerja adalah ujian majikan munasabah. Akhir sekali, responden menghujahkan bahawa sebab bagi pemecatan adalah bangkangan; bahawa hukuman yang dikenakan atas perayu adalah dalam sebahagian besarnya respon majikan yang munasabah; dan bahawa penentuan hukuman adalah suatu perkara yang sebahagian besarnya dalam budi bicara majikan. Isu yang perlu diputuskan ialah sama ada keputusan untuk menamatkan perayu daripada perkhidmatan adalah tidak seimbang dengan salah laku yang terbukti dilakukan oleh perayu.

Diputuskan, membenarkan rayuan dengan kos RM20,000:

(1) Adalah matan bahawa jika majikan memilih untuk menetapkan dasar yang mengawal tingkah lakunya dan juga pekerja-pekerjanya, majikan dijangka terikat dengan dasar-dasar tersebut dan jangkaan sah yang mereka buat di pihak kedua-dua majikan dan pekerja (lihat perenggan 37).

(2) Setelah mempertimbangkan rekod rayuan, mahkamah mendapati ada bukti kukuh untuk menyokong dapatan fakta Mahkamah Perusahaan. Adalah undang-undang matan bahawa penemuan fakta mahkamah perbicaraan berhak untuk pemberatan tinggi apabila dirayu dan tidak boleh diganggu kecuali atas sebab-sebab yang kukuh dan sah. Mahkamah tidak menemui apa-apa alasan kukuh untuk mengganggu keputusan Mahkamah Perusahaan mengenai hal ini (lihat perenggan 39).

(3) Prinsip perkadaran memerlukan mahkamah mencapai keseimbangan berkesan antara tahap tingkah laku pekerja dan hukuman yang dijatuhkan. Hukuman hendaklah sepadan dengan keseriusan kesalahan itu. Oleh itu, menggunakan ujian perkadaran itu, hakim telah terkhilaf secara serius dalam mengganggu award yang diberikan oleh Mahkamah Perusahaan (lihat perenggan 24 & 41).

(4) Mahkamah berpendapat bahawa hakim Mahkamah Tinggi terkhilaf dalam mengganggu award itu yang diputuskan oleh Mahkamah Perusahaan. Mahkamah bersetuju dengan dapatan Mahkamah Perusahaan bahawa berdasarkan keadaan dan latar belakang fakta kes, pemecatan perayu adalah penalti yang terlalu berat dan terlalu tidak seimbang dengan keseriusan salah laku yang dilakukan oleh perayu. Salah laku perayu tidak mewajarkannya dipecat daripada perkhidmatan (lihat perenggan 33–34 & 41).]

Notes

For cases on certiorari, see 1(1) *Mallal's Digest* (5th Ed, 2015) paras 384–405.

Cases referred to

Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal [2014] 6 MLJ 377; [2014] 1 LNS 686, CA (refd)

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680, CA (refd)

British Leyland UK Ltd v Swift [1981] IRLR 91, CA (refd)

Council of Civil Service Unions and others appellants v Minister for the Civil Service [1985] AC 374, HL (refd)

Fraser & Neave (M) Sdn Bhd v Chua Boon Su [1992] 2 ILR 393 (refd)

Karmel v Calgary Jewish Academy 2015 ABQB 731, QB (refd)

Kurnia Insurans (Malaysia) Bhd v Clara Tai Saw Lan & Anor [2000] 1 CLJ 518, HC (refd)
Lim Eye Thun v Majlis Peguam Malaysia & Anor [2010] 2 MLJ 444; [2010] 2 CLJ 45, CA (refd)
Menon v The Brooklands (Selangor) Rubber Co Ltd [1968] 2 MLJ 186, FC (refd)
Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform [2008] CAT 36 (refd)
Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305, CA (refd)
New Straits Times Press (M) Bhd v Ravichandran a/l Marimuthu & 12 Orang Perayu Lain [1999] ILJU 10; [1999] 3 ILR 588, IC (refd)
Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd [2006] 5 MLJ 113; [2006] 3 CLJ 837, FC (refd)
Norizan bin Bakar v Panzana Enterprise Sdn Bhd [2013] 6 MLJ 605; [2013] 4 ILR 477, FC (refd)
Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik [2002] 2 MLJ 27; [2002] 1 CLJ 181, FC (refd)
Pham v Secretary of State for the Home Department [2015] UKSC 19, SC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)
Regina (Corner House Research and another) v Director of the Serious Fraud Office (JUSTICE intervening) [2009] AC 756, HL (refd)
Regina (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, HL (refd)
Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd [1997] 1 MLJ 352; [1997] 1 CLJ 646, SC (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317, CA (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1995] 2 MLJ 476, HC (refd)
Tenby World Sdn Bhd v Soh Chong Wan & Anor [2013] 10 CLJ 822, HC (refd)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765; [2014] 6 CLJ 541, FC (refd)

Legislation referred to

British Nationality Act 1981 [UK] s 40(2)
Enterprise Act 2002 [UK] s 120
Industrial Relations Act 1967 s 20(1)

Appeal from: Application for Judicial Review No 25–81–07 of 2014 (High Court, Penang)

Alex Keong (Eric Cheah with him) (Hong, Cheah & Co) for the appellant.

Ajit Singh Jessy (Pravin Kaur Jessy with him) (Jessy & Assoc) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal is directed against the judgment dated 13 May 2015 rendered by the High Court at Penang, whereby the High Court had granted the respondent's application for an order of certiorari to quash Award No 608 of 2014 handed down by the Industrial Court on 7 May 2014. By the said award, the Industrial Court found that the appellant had been guilty of insubordination but the Industrial Court held that the punishment of termination from service was too harsh a penalty and ordered payment of compensation and back wages instead. Rescaling of the amount, however, was ordered by reason of contributory conduct on the part of the appellant of 50%.

FACTS AND PROCEDURAL HISTORY

[2] The facts and procedural history of the case have been dealt with in detail in the award of the Industrial Court and the judgment of the learned High Court judge which we do not intend to repeat here. They may be summarised as follows:

(a) the appellant joined the respondent on 1 November 1989. She was the first employee and instrumental in setting up the respondent with its headquarters in Penang and the branch office in Kuala Lumpur. The respondent is part of a multi-national corporation by the name of 'Tui Travel', listed in the London Stock of Exchange;

(b) at the time of her dismissal, the appellant was the Regional Manager for Malaysia and Brunei, whereas Mr Manuel Ferrer, her immediate boss, was of Spanish origin, trained in law in Spain and eight months into his job as the Regional Director for Malaysia and Indonesia and the Regional Manager for Singapore;

(c) the problem arose when Mr Manuel Ferrer and the Managing Director for Asia, Mr Jacques Arnoux, wanted a further upward adjustment of the budgetary goal from 1,228,000 Euros to 1,447,000 Euros ie a further increase by 219,000 Euros. The direction was inconsistent with the directive of its HQ in London and would have gravely disrupted the work of the Malaysian office. The appellant, therefore, sought assistance and direction from both Mr Arnoux and Mr Manuel Ferrer, for a detailed plan and strategy to support and justify this further upward adjustment in budget;

(d) as the factual matrix would further unfold, the appellant was summarily dismissed from her employment on 30 December 2009. The reason

given was for insubordination to orders given by her superior. There were three instances of insubordination pleaded by the respondent:

(i) refusing to follow Mr Manuel Ferrer, who instructed the appellant to make payment for a company related expense, which she refused to do;

(ii) on 19 October 2009, the appellant had also refused to make adjustments to the Budget 2009/2010, as instructed by Mr Manuel Ferrer and Jacques Arnoux; and

(iii) the appellant wrote an email dated 23 November 2009 to Mr Carlos Munoz, wherein she said:

> Meanwhile, as I said, I won't report to Manuel Ferrer, so what to do next.

(e) subsequent to her dismissal, the appellant made a representation for reinstatement pursuant to s 20(1) of the Industrial Relations Act 1967 ('the IRA'). Thereafter, the Minister of Human Resources referred the matter for adjudication to the Industrial Court;

(f) the Industrial Court found that the appellant had committed one act of insubordination, namely that arising from the content of the appellant's email dated 23 November 2009 to Mr Carlos Munoz;

(g) as alluded to earlier, the Industrial Court held that punishment inflicted on the appellant was not proportionate in its severity to the gravity of the appellant's misconduct and ordered payment of compensation and back wages instead;

(h) being dissatisfied with the award of the Industrial Court, the respondent applied to the High Court for judicial review, seeking the issuance of a writ of certiorari to quash to the award of the Industrial Court. On re-appreciation of the material evidence on record, the High Court allowed the respondent's application for judicial review; and

(i) aggrieved with the decision of the High Court, the appellant appealed to this court.

ISSUE

[3] Before us, the sole issue for determination is whether the decision to terminate the appellant from service was disproportionate to the proven misconduct committed by the appellant.

PARTIES' RESPECTIVE SUBMISSIONS

[4] Learned counsel for the appellant submitted that the learned High Court judge erred in interfering with the Industrial Court's award as the Industrial Court was right in its decision that the summary dismissal of the appellant by the respondent was out of all proportion, improper and unjust when compared with the single act of insubordination committed by the appellant.

[5] According to learned counsel, the question posed by the Industrial Court was totally correct:

> But here then, a very pertinent question arises – did the assailed e-mail and her impugned conduct towards her superior amount to insubordination that was severe enough to warrant the summarily executed ultimate punishment in industrial jurisprudence of dismissal; and that too, in light of 20 long years of pioneering, unblemished, profitable and loyal service to the company, in particular, and to the corporation in general? In the entire circumstances of this case, I think not.

(See record of appeal *Jld* 5, p 500).

[6] In support of his submission, reliance was placed on the decision of the Federal Court in *Norizan bin Bakar v Panzana Enterprise Sdn Bhd* [2013] 6 MLJ 605; [2013] 4 ILR 477. In that case, the Federal Court has affirmed the position that the Industrial Court is empowered and indeed is duty bound to consider proportionality of punishment by the employer in the event the charge is made out against the employee. By relying upon this case, it was the contention of learned counsel that the punishment meted out by the respondent in summarily dismissing the appellant from service was grossly excessive, harsh and disproportionate to the nature of the charge established against the appellant.

[7] Learned counsel further submitted that the learned High Court judge fell into serious error in holding that the Industrial Court failed to direct its mind to the cumulative acts of insubordination. As can readily be seen from the award, the Industrial Court had indeed directed its mind to the alleged cumulative acts of subordination adverted to by the learned High Court judge. The respondent's case, as narrated by the Industrial Court, inter alia, is as follows:

> As a result of this repeated and open defiance to the instructions and directives of two of the superiors, viz the most senior personnel of the corporation's regional operations; and for her unreasonable demands in order to go quietly, the company saw it fit to terminate their employment relations with the claimant without any further ado and in the manner that they did, on 30 December 2009. The company was not prepared to tolerate any longer the claimant's blatant contests to its management prerogatives to manage its business in the manner it deemed fit for

with profitability, efficiency and indeed policy; nor to accept her flagrant refusal to execute the plans and achieve the targets set under those prerogatives.

(See appeal record *Jld* 5, p 490).

[8] Learned counsel argued that there is no rhyme or reason for the learned High Court judge to quash the Award handed down by the Industrial Court as the Industrial Court had not acted on no evidence or had come to a conclusion it could not reasonably come to. Nor there is any basis for the contention that the Industrial Court had asked itself the wrong question; took into account irrelevant considerations; or it misconstrued the terms of any relevant statutes; misapplied or misstated the principle of general law (see *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317).

[9] Further, there are no extenuating and aggravating circumstances existing against the appellant which would lead to the imposition of extreme penalty of dismissal by the respondent.

[10] In reply, learned counsel for the respondent submitted that the learned High Court judge was correct in interfering with the Industrial Court's award as the Industrial Court had erroneously failed to exercise its jurisdiction in appreciating the evidence on record and had misapplied the law and failed to take relevant facts into consideration.

[11] Learned counsel for respondent posited that the only appropriate punishment was dismissal, as the appellant's conduct amounted to giving formal notice to her superior that she will no longer act in a subordinate capacity and will not receive any orders from them.

[12] In support of his submissions, reliance was placed on the following cases:

(a) *Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd* [2006] 5 MLJ 113; [2006] 3 CLJ 837;

(b) *Lim Eye Thun v Majlis Peguam Malaysia & Anor* [2010] 2 MLJ 444; [2010] 2 CLJ 45;

(c) *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ 27; [2002] 1 CLJ 181;

(d) *Fraser & Neave (M) Sdn Bhd v Chua Boon Su* [1992] 2 ILR 393;

(e) *Menon v The Brooklands (Selangor) Rubber Co Ltd* [1968] 2 MLJ 186; and

(f) *Kurnia Insurans (Malaysia) Bhd v Clara Tai Saw Lan & Anor* [2000] 1 CLJ 518.

[13] Learned counsel for the respondent further submitted that the appropriate test to determine whether it was reasonable to dismiss the worker is that of the reasonable employer's test. Reference was made to the case of *British Leyland UK Ltd v Swift* [1981] IRLR 91 which has been adopted by the courts in Malaysia in the case of *Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 MLJ 352; [1997] 1 CLJ 646), where the court observed as follows:

> There is a band of reasonableness within which one employer may reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him then the dismissal must be upheld as fair; even though some other employers may not have dismissed him.

[14] It was also the contention of learned counsel for the respondent that the Industrial Court failed to take into account the following relevant matters in deciding the appropriate punishment on the appellant:

(a) that the appellant was openly defying the written and explicit orders of two of her superiors, who were the most senior personnel in its regional operations;

(b) that it is the management prerogative to manage its business in the manner it deems fit for profitability and efficiency. The duty of the employee is to execute those plans and achieve targets set therein;

(c) that whilst an employee is free to express her views, she is in no position to dictate to the management, how the business should be managed. That is the management's sole prerogative;

(d) that upon the appellant's refusal to report to her superior, the respondent attempted to resolve the matter amicably. The appellant was told to go on leave. Thereafter, the appellant requested for a separation package, rejected the respondent's offer and made a claim that the respondent was not willing to entertain; and

(e) that in the light of the above defiant conduct, the respondent was left with no other alternative but to terminate her service.

[15] The appellant had committed insubordination on three occasions which warranted an order of dismissal from service. Therefore, the award of the Industrial Court was clearly flawed and riddled with errors of law and fact and was rightly quashed by the High Court with costs.

[16] In a nutshell, the submission of learned counsel for the respondent is that the reason for dismissal was gross insubordination; that the penalty imposed on the appellant was within the range of reasonable response for a reasonable employer; and that the determination of an appropriate sanction or sentence is a matter which is largely within the discretion of the employer.

OUR FINDINGS

Reasons for granting judicial review and standard of review

[17] The classic statement of the ground for judicial review is that of Lord Diplock in *Council of Civil Service Unions and others appellants v Minister for the Civil Service* [1985] AC 374, at 40D: '... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.' Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in good faith, fettering discretion, unauthorised delegation, failure to act etc, fall under the heading 'illegality'. Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as audi alteram partem absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc.

[18] Judicial review is not a review of the merits of a decision (see *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305, *Tenby World Sdn Bhd v Soh Chong Wan & Anor* [2013] 10 CLJ 822, and *Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal* [2014] 6 MLJ 377; [2014] 1 LNS 686). The limit to judicial review has been forcefully restated in two cases in United Kingdom. In *Regina (Corner House Research and another) v Director of the Serious Fraud Office (JUSTICE intervening)* [2009] AC 756, the Director of the SFO had discontinued an inquiry into corruption in BAe following a threat from the Saudi Government to withhold national security cooperation. The Divisional Court issued a stinging rebuke to the Director, holding that he had 'failed to appreciate that protection of the rule of law demanded that he should not yield to the threat' and ignored the principle that 'submission to a threat is lawful only when it is demonstrated to a court that there was no alternative course open to the decision-maker'. The House of Lords, however, held that the 'principle' identified by the Divisional Court was an unhelpful distraction. The proper approach was to apply the ordinary rules of judicial review, in which the merits of the decision are firmly off-limits (para 41):

> The issue in these proceedings is not whether his decision was right or wrong, nor whether the Divisional Court or the House agrees with it, but whether it was a

decision which the Director was lawfully entitled to make. Such an approach involves no affront to the rule of law, to which the principles of judicial review give effect.

[19] So too in its *Merger Action Group* decision (*Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 36), dismissing a 'judicial review'-style challenge under s 120 of the Enterprise Act 2002 against the Secretary of State's decision not to refer a merger between Lloyds TSB and HBOS to the Competition Commission, the CAT held (paras 59–60) that:

> The grounds on which an administrative act or decision can be called into question by judicial review are well established ie the traditional grounds of illegality, irrationality and procedural impropriety ...
>
> the exercise of judicial review should be contrasted with an appeal 'on the merits', a standard which the tribunal is required to apply in appeals under the provisions of the Competition Act 1988 and Communications Act 2003. In an appeal on the merits, the tribunal is entitled to substitute its own views for those of the decision maker. In contrast, judicial review proceedings are solely concerned with the lawfulness of a decision and not its correctness.

[20] Having said that, we hasten to add that the current position of the law on judicial review in Malaysia permits a review of process and substance in determining the reasonableness of a decision by an administrative body and the test applicable in judicial review now is the objective test (see *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765; [2014] 6 CLJ 541).

[21] Insofar as the law on judicial review affecting the Industrial Court decision in Malaysia is concerned, it had been clearly explained and clarified by Raus Sharif FCJ (now PCA) in the Federal Court case of *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1, where His Lordship held:

> Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permit the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.

[22] It was also held in that case that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the

Industrial Court had been arrived by taking into consideration irrelevant matters, or had failed to consider relevant matters, such findings are always amenable to judicial review by the High Court.

[23] It is clear, therefore, that the court is entitled to determine whether the administrative body's conclusions are adequately supported by evidence; that the facts have been properly found; that all material factual considerations have been taken into account; and that material facts have not been omitted. In *Administrative Law* (9th Ed) edited by Sir William Wade and Christopher Forsyth, under the heading 'No evidence rule', at p 272, the following passage appears:

> ... the limit of ... indulgence is reached where findings are based on no satisfactory evidence. It is one thing to weigh conflicting evidence which might justify a conclusion either way, or to evaluate evidence wrongly. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene.
>
> No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding; or where, in the other words, no tribunal could reasonably reach that conclusion on the evidence. This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and ultra vires ...

Proportionality

[24] This instant appeal brings into focus yet again the principle of proportionality. In essence, the proportionality principle requires the court to strike an effective balance between the severity of an employee's conduct and the sanction imposed. As Professor Endicott has eloquently remarked, it is 'unreasonable to use a sledgehammer to crack a nut, or to make a mountain out of a mole hill' (see Endicott, *Administrative Law*, at p 273). This applies to awards of punishment also. Punishment should be commensurate with the gravity of the offence.

[25] Proportionality is not a traditional and/or general ground for judicial review, except in the sense in which proportionality is built into 'Wednesbury unreasonableness'. In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680, Lord Geene MR alluded to the grounds of attack which could be made against the decision, citing unreasonableness as a 'umbrella concept' which covers the major heads of review and pointed out that the court can interfere with a decision if it is so absurd that no reasonable decision maker would in law come to it.

[26] The House of Lords in *Regina (Daly) v Secretary of State for the Home*

Department [2001] 2 AC 532 demonstrated how the traditional test of *Wednesbury* unreasonableness has moved towards the doctrine of necessity and proportionality. Lord Steyn noted that the criteria for proportionality are more precise and more sophisticated than traditional grounds of review and went on the outline three concrete differences between the two:

(a) proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions;

(b) proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and

(c) even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

[27] The recent decision of the United Kingdom Supreme Court in *Pham v Secretary of State for the Home Department* [2015] UKSC 19 marks a turning-point in the role of proportionality as a common-law ground of judicial review. The key issue in that case was whether it was lawful for the Home Secretary to strip the appellant of his British citizenship and depart home to Vietnam, where he was born. He acquired British citizenship in 1995 but never renounced his Vietnamese nationality. In 2011, the Home Secretary made an order under s 40(2) of the British Nationality Act 1981 depriving the appellant, who had allegedly participated in terrorist training in Yemen. The appellant was notified that he would be departed to Vietnam. When the Vietnam Government subsequently argued that the appellant was not a Vietnam national, the appellant challenged the Home Secretary's decision on the ground that it would render him stateless.

[28] In the proceedings, the alternative argument advanced by the appellant was to the effect that deprivation of British citizenship operated so as to deprive the claimant of his citizenship of the European Union, the latter being parasitic upon the former; that this EU dimension dictated that the Home Secretary's decision should be reviewed on proportionality grounds; and that the Home Secretary's decision would not pass muster under the proportionality test.

[29] It is interesting to note that Lord Sumption (with whom Lords Neuberger and Wilson and Lady Hale agree) was willing to countenance the possibility of proportionality review at common law. His Lordship observed that:

> although English law has not adopted the principle of proportionality generally, it has for many years stumbled towards a concept which is in significant respects similar, and over the last three decades has been influenced by European

jurisprudence even in areas of law lying beyond the domains of EU and international human rights law. Starting with the decision of the House of Lords in *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514 it has recognised the need, even in the context of rights arising wholly from domestic law, to differentiate between rights of greater or lesser importance and interference with them of greater or lesser degree. This is essentially the same problem as the one to which proportionality analysis is directed. The solution adopted, albeit sometimes without acknowledgment, was to expand the scope of rationality review so as to incorporate at common law significant elements of the principle of proportionality.

[30] The decision of this case also evidenced the beginning of a judicial commitment to contextualism: to the notion that the standard of review should vary according to the circumstances of the case. The contextual approach has been accepted by courts in Canada. In the case of *Karmel v Calgary Jewish Academy* 2015 ABQB 731, Court of Queen's Bench of Alberta stated:

> [144] The approach is not only objective, it is also contextual: the Court must consider 'the particular circumstances surrounding the employee's behaviour ... factors such as the nature and degree of the misconduct, and whether it violates the 'essential conditions' of the employment contract or breaches an employer's faith in an employee' (*McKinley v BC Tel* 2001 SCC 38 (CanLII); 2001 SCC 38; [2001] 2 SCR 161, at para 39). This balances the employer's right to dismiss an employee for cause with the importance of both the work and the manner of dismissal to an employee's self-worth.
>
> [145] Mr Justice Iacobucci in *McKinley*, at paras 53–54, outlined the principle of proportionality that underlies the contextual approach:
>
> > [53] Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in reference *Re Public Service Employee Relations Act (Alta)* 1987 CanLII 88 (SCC); [1987] 1 SCR 313, where Dickson CJ (writing in dissent) stated at p 368:
> >
> > Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.
> >
> > This passage was subsequently cited with approval by this Court in *Machtinger v HOJ Industries Ltd* 1992 CanLII 102 (SCC); [1992] 1 SCR 986, at p 1002, and in *Wallace v United Grain Growers Ltd* 1997 CanLII 332 (SCC); [1997] 3 SCR 701, at para 95. In *Wallace*, the majority added to this notion by stating that not only is work itself fundamental to an individual's identity, but 'the manner in which employment can be terminated is equally important'.
> >
> > [54] Given this recognition of the integral nature of work to the lives and

identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In *Wallace*, both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places employees in a vulnerable position vis a vis their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal.

[31] In Malaysia, it is well settled that the Industrial Court has the jurisdiction to substitute its own view in respect of the quantum and/or degree of punishment in place of the employer's view. In *New Straits Times Press (M) Bhd v Ravichandran a/l Marimuthu & 12 Orang Perayu Lain* [1999] ILJU 10; [1999] 3 ILR 588, the Industrial Court reviewed the punishment of dismissal which was imposed by the employer in respect of 13 workmen who had been dismissed for taking part in a picket. The Industrial Court held that the dismissals of the workmen were without just cause or excuse. The Industrial Court held at p 597 as follows:

It is also the law that before the punishment of dismissal is meted out employers ought to take into account the seriousness of the misconduct and the past record of the employees.

...

In the court's opinion the punishment of dismissal meted out to the claimants was in the circumstances harsh. It was tainted by vindictiveness on the part of the company and not in accordance with principles of industrial relations and good conscience and equity. Therefore the court would say that the claimants from the circulation department also were dismissed without just cause.

[32] The issue has been authoritatively settled by the decision of the Federal Court case in *Norizan bin Bakar v Panzana Enterprise Sdn Bhd*, where His Lordship Raus Sharif PCA, in delivering the judgment of the court, said:

Thus, in reference to the questions posed to us, we are of the view that the Industrial Court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and also to decide whether the punishment of dismissal was too harsh in the circumstances when ascertaining the award under s 20(3) of the IRA. We are further of the view that the Industrial Court in exercising the aforesaid functions can rely to its powers under s 20(3) of the IRA based on the principle of equity, good conscience and substantial merit of the case.

Clearly, the reference by the Federal Court in *Milan Auto*'s decision to the 'two fold' test, especially the second fold where the Industrial Court has to decide whether the proven misconduct constitutes just cause or excuse for the dismissal is clear reference to the duty of the Industrial Court to apply the doctrine of proportionality of punishment. This is consistent to what is required of the Industrial Court under

s 30(6) in making an award which provides:

> (6) In making its award, the court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under s 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under s 20(3).

Pertinent to note that, under the IRA itself there is an inbuilt mechanism through Item 5 of the Second Schedule to consider the doctrine of proportionality of punishment. Item 5 provides as follows:

> Any relief given shall take into account contributory misconduct of the workman.

Based on the above, it is clear that the Industrial Court can go on to decide on the relief to be granted by taking into account of contributory misconduct and as such we are of the view that the doctrine of proportionality of punishment is already inbuilt into the IRA.

[33] Considering the authorities and their application to the facts of this instant appeal, and the factors that are to be considered, with respect, we are of the firm opinion the learned High Court judge erred in interfering with the award handed down by the Industrial Court.

[34] We agree with the finding of the Industrial Court that under the circumstances and factual antecedents of the case, the dismissal meted out on the appellant was too harsh a penalty. The appellant's misconduct does not warrant the imposition of the ultimate sanction of dismissal from service. It is undisputed that:

(a) the appellant had worked for the respondent for 20 years;

(b) the appellant had an unblemished employment record;

(c) the appellant was instrumental in setting up the respondent's headquarters in Penang and the branch office in Kuala Lumpur;

(d) the appellant's tireless and faithful service to the respondent is evidenced by the profits earned by the respondent;

(e) the appellant had committed a single act of insubordination; and

(f) the said insubordination was the appellant's first misconduct in her long years of service. There was no history of past misconduct; even no warning was given to her at any point of time.

[35] Learned counsel for the respondent submitted that the Industrial Court failed to take into account the previous acts of insubordination in the course of rendering the award. With respect, we disagree. The alleged prior

insubordination by the appellant concerns the air fares of two sales and marketing representatives to attend a meeting in Chiang Mai, Thailand on 26–30 June 2006. In our view, the appellant had proffered a reasonable and acceptable explanation. According to the appellant, the strict instruction from Mr Arnoux in his email dated 27 February 2009 to the effect that it was mandatory to cut costs on airfare incurred and if company staff were to travel by business class, the company would only bear the cost of an economy class ticket and the staff members concerned would have to personally bear the differences.

[36] The two Sales & Marketing representative are from United Kingdom, namely Ms Kim Joynes who had incurred 40,942 Thai Baht and Mr David Marks, who had incurred 124,000.30 Thai Baht. The Malaysian office and the other five countries were asked to absorb Mr David Marks's airfare equally but bearing Mr Arnoux's strict instructions in mind, the appellant's position was that for Mr David Mark's air ticket, Malaysia office would only absorb an amount equal to that for the price of Ms Kim Joynes air ticket.

[37] It trite that where an employer chooses to set policies that govern its conduct, as well as that of its employees, the employer should expect to be held to those polices and the legitimate expectations they create on the part of both the employer and the employee.

[38] The Industrial Court found that the appellant had committed only one act of insubordination. The Industrial Court had this to say at p 26 of the appeal record, *Jld* 5 *Bahagian* D:

> While the manner of the claimant's disagreement with the bosses for the budgetary issue may be 'sailed close to the winds of insubordination', what really 'filled the sails with that wind' was the claimant's e-mail of 23.11.2009 to Carlos Munoz ...

[39] We have carefully perused the appeal record and arrived at the same conclusion as the Industrial Court did. We find that there is substantial evidence on record to support the Industrial Court's finding of fact. It is trite law that findings of fact of trial courts are entitled to great weight on appeal and should not be disturbed except for strong and valid reasons. We do not find any cogent reason to disturb the finding of the Industrial Court on this point.

[40] As a final point, we reiterate that while we recognise the management's prerogative to discipline its employees, the exercise of this prerogative should at all times be reasonable and fair. Dismissal is the ultimate penalty that can be imposed on an employee. Where a penalty less punitive may suffice, whatever missteps may be committed by a delinquent employee ought not to be visited with a consequence so severe for what is at stake is not merely the employee's position but his very livelihood (see *Tan Tek Seng v Suruhanjaya Perkhidmatan*

Pendidikan & Anor [1995] 2 MLJ 476).

[41] Applying the proportionality test, we, therefore, hold that the learned High Court judge committed a grave error in interfering with award rendered by the Industrial Court. In the circumstances of this instant appeal, the imposition of the drastic penalty of dismissal is unduly harsh and grossly disproportionate to the gravity of the misconduct committed by the appellant and the appellant had been dismissed without just cause and excuse.

[42] For the foregoing reasons, the appeal is accordingly allowed with costs of RM20,000 and the judgment of the High Court is set aside and the Award No 608 of 2014 is affirmed. Deposit to be refunded.

Appeal allowed with costs of RM20,000.

Reported by Dzulqarnain Ab Fatar